In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1058

IDA PHILLIPS, PETITIONER

v.

MARTIN MARIETTA CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a–11a) is reported at 411 F.2d 1. That court's denial of rehearing and rehearing *en banc*, with three judges dissenting (Pet. App. 12a–21a), is reported at 416 F.2d 1257. The opinion of the district court (Pet App. 1a–3a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 1969. A timely petition for rehearing was denied on October 13, 1969. The petition for certiorari was filed on January 10, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under Title VII of the Civil Rights Act of 1964, an employer may, in the absence of business necessity, refuse to hire women with pre-school age children while hiring men with such children.

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964 provides in pertinent part:

42 U.S.C. 2000e–2

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

(e) Notwithstanding any other provision of this title (1) it shall not be an unlawful employment practice for any employer to hire and employ employees, * * * on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise * * *.

INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on sex. Under the Act, Congress has entrusted the United States Equal Employment Opportunity Commission and the At-

torney General with important responsibilities for obtaining compliance with the requirements of Title VII. The court of appeals' restricted interpretation of this important statutory mandate, if permitted to stand, will cause unwarranted hardship to families in which the mother is the only available breadwinner.[1] Moreover, the rationale of the decision below, if applied to the other prohibitions of Title VII against employment discrimination based on race, color, religion or national origin, would comprehensively impede the government's efforts to insure equality of employment opportunities for all residents of the United States.

STATEMENT

Solely because she was a woman with pre-school age children, the petitioner was denied employment as an assembly-trainee by the respondent corporation, which employs men with such children as assembly-trainees (Pet. App. 2a). She complained that this constituted discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964.

The district court eliminated the essence of petitioner's complaint by striking the portion alleging discrimination based on the fact that she had pre-school age children, on the ground that Title VII did not prohibit such discrimination. The court then

[1] As principal financial contributor to the Aid to Families with Dependent Children Program administered by the States under the Social Security Act (as well as in its role as tax collector), the United States also has a fiscal interest in the issues involved in this litigation. See *King* v. *Smith*, 392 U.S. 309; *Lewis* v. *Martin*, No. 829, this Term.

granted respondent's motion for summary judgment, based on an uncontroverted showing that a larger percentage of the women, as compared with the men, who applied for the job of assembly-trainee were hired.

The court of appeals affirmed, stating (Pet. App. 9a–10a):

> * * * The evidence presented in the trial court is quite convincing that no discrimination against women as a whole or the appellant individually was practiced by Martin Marietta. The discrimination was based on a two-pronged qualification, i.e., a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the coalescence of these two elements that denied her the position she desired.

A petition for rehearing was denied, with three judges dissenting from the denial of rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

The decision below directly affects a substantial number of women in the labor market [2] and condones discrimination against them in contravention of the federal policy of encouraging unemployed women with pre-school age children to seek gainful employment as an alternative to welfare payments.[3]

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[2] In March 1967, there were 10.6 million working women with children under 18 years of age. Of this number, 38.9 percent, or 4.1 million, were mothers with children under 6 years of age. "Who Are The Working Mothers?" U.S. Dept. of Labor, Wage and Hour Adm. (Leaflet 37, 1968).

[3] See, *e.g.*, President Nixon's Address to the Nation on Domestic

Moreover, application of the reasoning of the court of appeals to the Title VII prohibitions against employment discrimination based on race, color, religion, or national origin would have a severely limiting effect. For example, a practice of refusing to hire Negroes with pre-school children while hiring whites with such children would apparently come within the rationale of the decision below that:

> [w]hen another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex, or national origin [411 F.2d at 3–4].

Nothing in the record of the present case indicates that the respondent's policy of excluding women with pre-school age children from employment was based on any legitimate business interest related to the ability of such women to perform the work, or to the safety or efficiency of the respondent's business operations. Specifically, there was no showing that such

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Programs, Weekly Compilation of Presidential Documents, Vol. 5, No. 32, August 11, 1969, p. 1108:

> As I mentioned previously, greatly expanded day-care center facilities would be provided for the children of welfare mothers who choose to work. However, these would be day-care centers with a difference. There is no single idea to which this administration is more firmly committed than to the enriching of a child's first 5 years of life, and thus helping lift the poor out of misery, at a time when a lift can help the most. Therefore, these day-care centers would offer more than custodial care; they would also be devoted to the development of vigorous young minds and bodies. As a further dividend, the day-care centers would offer employment to many welfare mothers themselves.

women had a higher than average absentee rate, that they could not work necessary overtime, or that they had any other attribute which limited their utility to the respondent. Much less was there a showing that *all* women with pre-school age children were unable to perform adequately.

The courts below, therefore, did not rely on any overriding "business necessity,"[4] nor on the statutory exception for a "bona fide occupational qualification,"[5] in holding that the respondent's policy did not violate Title VII. Instead, the court of appeals' holding is explicitly based on a construction of the statute which condones discrimination based on sex so long as there is an additional, apparently neutral, reason for the otherwise unlawful employment practice.

This holding contravenes the plain language of Section 703, which makes it an "unlawful employment practice for an employer * * * to discriminate against any individual with respect to his * * * terms [or] conditions * * * of employment, because of such individual's race, color, religion, sex, or national origin * * *." To require of prospective women em-

[4] See *Local 53, Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (C.A. 5); *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (C.A. 5).

[5] Section 703(e)(1), 42 U.S.C. 2000e-2(e)(1), *supra*, p. 2.

ployees that they not have pre-school age children, while not requiring the same of men, is to discriminate against women on the basis of their sex in the "terms" or "conditions" under which they will be employed. The fact that some women, even if the number is substantial, have met this "term" or "condition" does not eliminate the disparate treatment received by those women who do not meet this qualification which is not required of men.

Where, as here, a qualification is imposed solely on applicants of one sex, it violates the statute unless the employer can justify such discrimination as a "bona fide occupational qualification" or business necessity." This is the essence of the congressional mandate. In departing from that mandate, the decision below has denied the statute's protection to a category of employment applicants who are among those most in need of that protection.

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[6] See, generally, *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (C.A. 7); *Weeks v. Southern Bell Telephone Co.*, 408 F.2d 228 (C.A. 5); *Rosenfeld v. Southern Pacific Co.*, 293 F. Supp. 1219 (C.D. Calif.); cf. *Lane v. Wilson*, 307 U.S. 268; *Louisiana v. United States*, 380 U.S. 145; *Gaston County v. United States*, 395 U.S. 285; *United States v. Sheetmetal Workers*, 416 F.2d 123 (C.A. 8). And see the Equal Employment Opportunity Commission's regulations implementing Title VII at 29 C.F.R. 1604.1-1604.3. See, also, cases cited in n. 4, *supra*.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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FEBRUARY 1970.